No. 97-1374

(10)

Supreme Court, U.S.
FILED
APR 3 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, *et al.*,

Appellants,

vs.

CITY OF NEW YORK, *et al.*,

Appellees.

ROBERT E. RUBIN,

Appellant,

vs.

SNAKE RIVER POTATO GROWERS, INC., *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036-6690
(212) 382-6600
LOUIS A. CRACO, JR., Chair
JAMES F. PARVER
Committee on Federal Legislation

DAVID P. FELSHER
Counsel of Record

145657

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE ACT VIOLATES THE PRESENTMENT CLAUSE AND OFFENDS THE PRINCIPLES OF BICAMERALISM AND SEPARATION OF POWERS	2
A. Congress May Not Legislatively Alter the Lawmaking Requirements of Article I ...	3
B. The Line Item Veto Upsets the Constitutional Balance of Power	5
C. The Act is an Unconstitutional Attempt to Delegate Congressional Authority	9
II. THE ACT VIOLATES THE RULES CLAUSE	13
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:	Page
Buckley v. Valeo, 424 U.S. 1 (1976)	2
Byrd v. Raines, 956 F. Supp. 25 (D. D.C.), *vacated and remanded on standing grounds*, 117 S. Ct. 2312 (1997)	10
City of New York v. Clinton, 985 F. Supp. 168 (D. D.C. 1998)	10
Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976)	12
Field v. Clark, 143 U.S. 649 (1892)	10, 12
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)	3n.4, 4, 7, 10
J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928)	10, 11, 12
Loving v. United States, 116 S. Ct. 1737 (1996)	9
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)	10
Raines v. Byrd, 117 S. Ct. 2312 (1997)	1n.2, 6n.7, 7
United States v. Ballin, 144 U.S. 1 (1892)	14
United States v. Smith, 286 U.S. 6 (1932)	14

	Page
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)	3
Wright v. United States, 302 U.S. 583 (1938)	7
Yakus v. United States, 321 U.S. 414 (1944)	12
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	10, 11
Constitution, Statutes and Rules:	
Article I	4
Article I, § 1	3, 10, 11
Article I, § 2, cl. 5	3n.4
Article I, § 3, cl. 6	3n.4
Article I, § 5	3n.4
Article I, § 5, cl. 2	13
Article I, § 7, cl. 2	*passim*
Article II, § 1	3n.4
Article II, § 2, cl. 2	3n.4
Article II, § 3	11

	Page
Article V	3n.4
Amendment XII	3n.4
2 U.S.C. §§ 691, *et seq.* (Supp. II 1996)	1
2 U.S.C. § 691 (Supp. II 1996)	13
2 U.S.C. § 691(a)(B) (Supp. II 1996)	8
2 U.S.C. § 691a(c)(1) (Supp. II 1996)	8
2 U.S.C. § 691a(c)(2) (Supp. II 1996)	8
2 U.S.C. § 691b(a) (Supp. II 1996)	8
2 U.S.C. § 691d(a) (Supp. II 1996)	14
2 U.S.C. § 691d(b) (Supp. II 1996)	15
2 U.S.C. § 691d(d) (Supp. II 1996)	15
2 U.S.C. § 691d(e) (Supp. II 1996)	15
2 U.S.C. § 691d(f) (Supp. II 1996)	15
Rules of the House of Representatives *in Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States*, 104th Cong. (1995) (House Doc. No. 103-42)	14n.10
Senate Manual, 104th Cong., 1st Sess. (1995) (Senate Doc. No. 104-1)	14n.10

Other Authorities:

	Page
The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)	2n.3
The Federalist No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961)	9n.9
Carl McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 San Diego L. Rev. 791 (1986)	2n.3
William H. Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations*, at 11 (1916)	6n.6, 9
Letter from George Washington to Edmund Pendleton (Sept. 23, 1793) in 33 *The Writings of George Washington*, 94, 96 (John C. Fitzpatrick ed. 1940)	6n.6
99 Cong. Rec. 215, 219, 221 (1953)	13, 14
103 Cong. Rec. 178 (1957)	13
141 Cong. Rec. S4443-49 (daily ed. Mar. 23, 1995)	1n.2

INTEREST OF AMICUS[1]

The Association of the Bar of the City of New York (the "Association") is a professional association of more than 21,000 attorneys, the majority of whom practice in New York City. The Association is chartered to study, address and promote the rule of law and, where appropriate, the reform of the law. The Association, by its Committee on Federal Legislation, has followed attempts in recent years to enact line item veto legislation[2] and has carefully studied the Line Item Veto Act, 2 U.S.C. §§ 691, *et seq.* (Supp. II 1996) (the "Act"). For the reasons set forth below, the Association believes that the Line Item Veto Act is an effort to accomplish an unconstitutional end by unconstitutional means. If upheld, the Act will undermine, in fundamental and dangerous ways, the Constitution's mechanism for federal lawmaking. With the attached consent of the parties, the Association of the Bar of the City of New York respectfully submits this brief as *amicus curiae* and urges the Court to strike down the Act.

SUMMARY OF ARGUMENT

The Act offends the Constitution in several ways. First, the Act rearranges the very structure of our government, taking significant responsibilities from Congress and transferring them to the Executive. The allocation of power between these branches is laid out in detail in the Constitution and Congress cannot change that structure by legislative fiat. Revisions of this nature and magnitude require an amendment to the Constitution. Second, by transferring to the President the power

1. Pursuant to Rule 37.6, this brief was authored and prepared in its entirety by the Association of the Bar of the City of New York.

2. The Committee's published opinion on an earlier line item veto bill was read into the Congressional Record. 141 Cong. Rec. S4443-4449 (daily ed. Mar. 23, 1995). The Association by the Committee filed an *amicus curiae* brief in *Raines v. Byrd*, 117 S. Ct. 2312 (1997).

unilaterally to cancel portions of existing law, the Act violates the Presentment Clause and undermines the bicameral structure of Congress and the separation of powers. Furthermore, the Act is an impermissible effort by Congress to delegate to the President its most basic duty -- to determine what the law shall be. As such, it radically upsets the constitutionally contemplated process of political compromise within the legislative branch and between the legislative and executive branches. Third, the Act establishes rules of procedure for succeeding Congresses, thereby violating the Rules Clause.

ARGUMENT

I.

THE ACT VIOLATES THE PRESENTMENT CLAUSE AND OFFENDS THE PRINCIPLES OF BICAMERALISM AND SEPARATION OF POWERS

The Constitution diffuses power on several levels. Power is divided between the federal and state sovereigns. Federal power is further diffused among three branches and legislative power is reposed in two separate chambers. The separation of powers among the different branches of the federal government is at "the heart of our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 119 (1976).[3]

The processes by which these branches bring their diffused power to bear on federal law is spelled out in detail in the Constitution. As set forth below, the Line Item Veto Act impermissibly tampers with these processes and fundamentally realigns the Constitution's diffusion of power.

3. The separation of powers doctrine is not merely to protect each branch from encroachments by the other two branches, but to protect the people from the undue concentration of power in any one branch. Carl McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 San Diego L. Rev. 791, 812 (1986); *see generally The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

A. Congress May Not Legislatively Alter the Lawmaking Requirements of Article I

This Court has stated that any fundamental change in the constitutional framework "must come not by legislation adopted either by Congress or by an individual State, but rather . . . through the amendment procedures set forth in Article V." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995).

Article I, § 1 vests federal legislative power exclusively in a bicameral Congress. The Presentment Clause, Art. I, § 7, cl. 2, prescribes the precise procedures by which that legislature may make law:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . .[4]

4. Exceptions to this procedure are carefully spelled out in the Constitution. Examples include the Senate's confirmation of Presidential appointments pursuant to Article II, § 2, cl. 2; the Senate's ratification of treaties pursuant to Article II, § 2, cl. 2; the sole power of the House of Representatives to initiate impeachment proceedings pursuant to Article I, § 2, cl. 5; the sole power of the Senate to hold trials and to convict following impeachment charges by the House of Representatives pursuant to Article I, § 3, cl. 6; the role of Congress in the election of a President pursuant to Article II, § 1 and the Twelfth Amendment; and the proposal of a constitutional amendment for submission to the states pursuant to Article V. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 955-56 and 955-56 n.21 (1983). Furthermore, each house has the power to act alone in handling certain specified matters. *See* Art. I, § 5.

The Presentment Clause thus requires that a bill first be passed in identical form by both the House and the Senate and then be presented to the President. The President must then either (i) sign the *entire* bill into law, (ii) veto the *entire* bill and send the *entire* bill back to Congress for reconsideration; or (iii) do nothing, in which case the *entire* bill becomes law after ten days, unless Congress adjourns within that time. Art. I, § 7, cl. 2.

The legislative steps outlined in Article I are not empty formalities; they are commands which simultaneously require and limit the participation of both houses of Congress and the President in lawmaking. As such, they may be altered only by constitutional amendment. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 958 n.23 (1983) ("Chadha"). In *Chadha*, this Court explained:

> Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. . . . These provisions of Art. I are integral parts of the constitutional design for the separation of powers. . . . "[T]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S., at 124. . . . [T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. . . . It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

Id. at 945-51.

The Line Item Veto Act effects fundamental changes to that "finely wrought and exhaustively considered, procedure." Wholly apart from the damage such changes would do to the Nation, it is clear that they cannot be achieved by statute. To change the very structure of its government by permitting a line item veto, this Nation must amend its Constitution. It has not.

B. The Line Item Veto Upsets the Constitutional Balance of Power

The Line Item Veto Act upsets the constitutional framework by transforming the President's limited power -- the veto of entire bills -- into a qualitatively different and far greater one -- the unilateral power to determine that only parts of enacted bills shall be the law of the land. Indeed, the very purpose of the Act is to give the President this dramatically expanded power to change enacted law, rather than merely to execute it. The Act therefore violates the Presentment Clause and scrambles the constitutional principles of separation of powers and bicameralism.

The Constitution decrees that to make, modify or repeal federal law, a bill must be approved by both houses of Congress. That bill may then be signed into law *in its entirety*; allowed to become law *in its entirety* by virtue of the President's inaction for ten days; or enacted into law *in its entirety* by both houses of Congress overriding a Presidential veto. Art. I, § 7, cl. 2.

The language of Article 1, § 7, cl. 2 makes plain that bills are to be approved or disapproved and returned and reconsidered *in toto*, not in part. Consequently, if the President wishes to prevent a bill from becoming law, the President must return it in its *entirety* to Congress for *reconsideration* or refuse to sign the *entire* bill.[5] The Constitution does not authorize the President

5. The Presentment Clause uses the term "it" or "its" 12 times, refers to "the Bill" twice, and uses the term "reconsider" or (Cont'd)

to accept part of a bill and reject the rest. The *in toto* requirement prevents any of the participants from unilaterally revising that which has been approved by the others and ensures that the bill that becomes law is the *same* bill that was passed by both houses of Congress.[6]

The Line Item Veto Act disregards this constitutional mandate by authorizing the President to sign an entire bill into law and then to immediately repeal portions of it — in other words, to exercise a partial veto. Congress cannot constitutionally give the President the power to veto portions of a bill presented by Congress and then sign others into law, as appellants herein have conceded. (*See* Brief for the Appellants at 34.)[7] The Line Item Veto Act, however, accomplishes the same result. It allows bills to become law in a different form than that which majorities in the House and the Senate passed.

(Cont'd)
"reconsideration" three times. From the context in which those terms are used, "it", "its", and "the Bill" plainly refer to "Every bill which shall have passed the House of Representatives and the Senate." In addition, the last sentence of the Presentment Clause refers to "any bill" not returned by the President within ten days of presentment and to "the same."

6. *Accord*, Letter from George Washington to Edmund Pendleton (Sept. 23, 1793) in 33 *The Writings of George Washington*, 94, 96 (John C. Fitzpatrick ed. 1940) ("From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto"); William H. Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations*, at 11 (1916) (The President "has no power to veto part of the bill and allow the rest to become a law").

7. In *Raines v. Byrd*, 117 S. Ct. 2312 (1997), the defendants and their *amici* conceded this same point in the Supreme Court. *See* Brief for the Appellants, at 34; Joint Brief of the United States Senate and the Bipartisan Legal Advisory Group of the United States House of Representatives as *Amici Curiae* for Reversal, at 18.

As this Court has recognized:

> By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials.

Chadha, 462 U.S. at 948-49. That requirement lies at the heart of bicameralism. Yet the Line Item Veto Act sweeps that fundamental constitutional principle aside. The law that takes effect after the President exercises the line item veto is different from the one passed by both houses of Congress. It is one that was never even considered, much less passed, by both houses of Congress.

Appellants argue that the Line Item Veto Act and the bill that has been dissected by the line item veto both pass constitutional muster because for a brief moment the latter bill, in its entirety, is signed into law. *See* Brief for the Appellants, at 34-35. This argument, however, not only elevates form over substance by ignoring the reality of what occurs, but also ignores the requirement of the Presentment Clause that Congress be allowed to *reconsider* a bill in its *entirety* whenever the President's rejection prevents the bill passed by both houses of Congress from being the law of the land[8]. This Court has indicated that the opportunity for reconsideration by Congress of a rejected bill is an essential element in the legislative scheme provided by the Constitution. *Wright v. United States*, 302 U.S. 583, 596 (1938) ("Where the President does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and to pass the bill despite his disapproval"); *see also Raines v. Byrd*, 117 S. Ct. at 2325-26 (Stevens, J., dissenting).

---

8. The sole exception to this requirement is in the case of a pocket veto, when Congress's adjournment prevents the return of the bill.

The Line Item Veto Act also contravenes two other mandates of the Presentment Clause. First, although the Presentment Clause limits the President to only ten days to veto a bill after receiving it, the Line Item Veto Act impermissibly extends that time period. The President can, for example, wait until the tenth day after a bill is presented to sign it into law and then wait five additional days before exercising the line item veto, *see* 2 U.S.C. §§ 691(a)(B) & 691a(c)(1) (Supp. II 1996); *see also* 2 U.S.C. § 691b(a) (Supp. II 1996). Second, although the Presentment Clause requires that the President's objections to a bill be entered in the journal of the house originating the bill, the Line Item Veto Act provides that the President's cancellations be published in the Federal Register. *See* 2 U.S.C. § 691a(c)(2) (Supp. II 1996).

The Line Item Veto Act also significantly changes the political gravity of the federal government. The Constitution contemplates, and the history of our Nation has always involved, a process of give and take between members of Congress and between Congress and the White House. The Line Item Veto Act undercuts this tradition by providing the President with a new and powerful club to wield over each individual member of Congress -- the authority to cancel expenditures of particular interest to that member, even after both houses have passed them and the President has signed them -- unless the member accommodates the President's wishes in other matters. To be confident that any expenditure would survive a line item veto, each member would be forced to horse-trade with the President directly, as well as with other members, during the process of Congressional consideration of each expenditure. This effectively transforms the President into a superlegislator -- a result which stands the Framers' "finely wrought" system on its head.

President Taft expressed grave concerns over affording the President the extraordinary power of a line item veto:

> Still, I think the power to veto items in an appropriation bill might give too much power to the President over congressmen. It is wiser to leave the remedy for the above to the action of the people in condemning at the polls the party which becomes responsible for such riders than to give, in such a powerful instrument, a temptation to its sinister use by a President eager for continued political success.

William H. Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations, supra*, at 20.

Such an unprecedented accumulation of power in the President's hands fundamentally alters the nature of the lawmaking dialogue between the branches and, to some extent, transfers the ultimate power of the purse from the legislature to the executive.[9]

This reality also belies the notion that the line item veto is limited to certain budgetary matters. While the Act restricts the use of the line item veto to budgetary matters, it is obvious that the President can use the threat of a line item veto to coerce cooperation from individual members of Congress on non-budgetary issues.

C. The Act is an Unconstitutional Attempt to Delegate Congressional Authority

This Court has repeatedly held "the lawmaking function belongs to Congress, U.S. Const., Art. 1, §1, and may not be conveyed to another branch or entity." *Loving v. United States*, 116 S. Ct. 1737, 1744 (1996). Accordingly, "Congress

9. The Framers feared combining the power of the purse with the power of the sword. *See The Federalist* No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) ("[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people. . . .").

manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President. . . ." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power"); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution").

The power to repeal or amend existing law is indisputably a legislative power, which the Constitution vests solely in the Congress. *See* Art. I, § 1; *Chadha*, 462 U.S. at 954. The Line Item Veto Act is an unprecedented attempt by Congress to alienate that basic legislative function. As the District Court explained in *Byrd v. Raines*, 956 F. Supp. 25 (D. D.C.), *vacated and remanded on standing grounds*, 117 S. Ct. 2312 (1997):

> the cancellation power conferred by the Act is indeed *revolutionary. . . . Never before* has Congress attempted to give away the power to shape the content of a statute of the United States, as the Act purports to do. *As expansive as its delegations of power may have been in the past, none has gone so far as to transfer the function of repealing a provision of statutory law.*

Id. at 37 (emphasis added). *See also City of New York v. Clinton*, 985 F. Supp. 168, 181 (D. D.C. 1998) ("The Line Item Veto Act impermissibly crosses the line between acceptable delegation of rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, *the authority to permanently shape laws and package legislation*") (emphasis added).

Moreover, Article I, § 1 vests all legislative power in Congress. Executive power is limited to faithfully executing the laws. *See* Art. II, § 3. As this Court explained in *Youngstown Sheet & Tube Co.*, 343 U.S. at 587:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

The Line Item Veto Act violates this fundamental principle by granting to the President the power to be the lawmaker. The Act authorizes the President to pick and choose among portions of enacted law and determine which pieces shall remain the law. Congress has thus impermissibly granted the President the essential legislative power of amending existing law.

Appellants attempt to characterize the Act as a delegation to the President of authority not to spend duly appropriated money subject to "intelligible principles" articulated in the Act. Brief for the Appellants, at 44-49. This Court's holding in *J.W. Hampton*, however, illustrates that "intelligible principles" delegations differ significantly from this unconstitutional attempt by Congress to divest itself of fundamental lawmaking power. There, Congress had authorized the President to raise or lower import tariffs to equalize differences which, after factual investigation, the President found to exist between foreign and domestic production of similar products. 276 U.S. at 404-05. Because Congress lacked information about "changing conditions" necessary to make the required adjustments, the delegation was permitted "to give effect to the principle on which the statute proceeds." *Id.* Chief Justice Taft explained:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Id. at 407, *quoting Cincinnati, Wilmington & Zanesville Rail Road Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852).

Similarly, in *Field v. Clark*, *supra*, 143 U.S. 649, Congress authorized the President to suspend temporarily the duty-free importing of specified goods if he found a country producing those goods imposed reciprocally unequal or unreasonable duties upon United States products. "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President." *Id.* at 693. Congress determined when the law would be suspended and merely left it to the President to determine when, and if, those conditions arose. Faithfully adhering to this principle, this Court has from time to time permitted Congress to allow the Executive branch to provide technical expertise or determine whether certain specified conditions had occurred. *See, e.g., Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976) (President authorized to adjust petroleum imports by imposing license fees upon actual findings that specified considerations had been met); *Yakus v. United States*, 321 U.S. 414, 423-25 (1944) (Executive may set price ceilings upon making specific factual determinations.)

No such circumstance exists here. Congress is certainly able -- indeed, is constitutionally required -- to decide which spending items and tax benefits should be enacted into law and which should not. The Line Item Veto Act does not simply entitle the Executive branch to find facts, to discern contingencies or to apply expertise -- it invites the President to exercise discretion,

unbound by any real parameter, to retain parts of duly enacted legislation and to repeal others. In short, it is governed by no "intelligible principle" at all. This Court has never sanctioned so broad a Congressional abdication of authority and should not now.

If the Court upholds the power of statutory repeal, which the Act gives to the President, Congress will be free to provide the President with the power to rescind any existing law. There is no tenable constitutional distinction between the "delegation" here and Congress delegating authority to repeal civil rights laws, minimum wage laws, laws protecting health and the environment, or the criminal code.

II.

THE ACT VIOLATES THE RULES CLAUSE

The Rules Clause of the Constitution provides that "Each House may determine the Rules of its Proceedings. . . ." Art. I, § 5, cl. 2. The Line Item Veto Act is inconsistent with the Rules Clause for two reasons. First, under the Act, one Congress is establishing procedural rules for the expedited consideration of disapproval bills by succeeding Congresses, thus precluding each chamber in succeeding Congresses from setting its own rules. Second, the Act allows the President to determine the items to be canceled and thus limits the content of expedited disapproval bills. *See* 2 U.S.C. § 691 (Supp. II 1996).

The Rules Clause explicitly states that each house may determine its *own* rules of proceedings. Art. I, § 5, cl. 2. That means that the membership of each chamber, sitting at the time, must have the ability to determine that chamber's internal rules. *Cf.* 103 Cong. Rec. 178 (1957) ("the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress"); 99 Cong. Rec. 215

(1953) ("the Senate has a right, under the Constitution of the United States, to adopt its own rules for every Congress"); 99 Cong. Rec. at 219, 221. Thus, one Congress cannot prevent the houses of a succeeding Congress from changing their rules of proceedings. *See United States v. Ballin*, 144 U.S. 1, 5 (1892) ("[t]he power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal").

Thus, each chamber has the power and authority to set its own rules regarding a variety of internal matters.[10] The problem with legislation, such as the Act, which restricts the rulemaking power of either chamber is that such legislation can only be abrogated or amended by a subsequent piece of legislation. The second piece of legislation must be passed by *both* chambers and either approved by the President or enacted over the President's veto. This is contrary to the Rules Clause. Legislation, such as the Act, affecting the internal rulemaking power of either chamber also results in one chamber of Congress exercising partial control over the internal rules of the other chamber. While the Constitution grants each chamber the power to set its own rules, that power can only be exercised in conformity with constitutional constraints. *See United States v. Ballin, supra,* 144 U.S. at 5; *United States v. Smith*, 286 U.S. 6, 33 (1932).

Several subsections of the Act violate the Rules Clause by controlling Congress's internal rules and procedures, as well as the form and content of bills.

Subsection 691d(a) specifies particular committees within both the House and Senate to which the President's special

10. *See e.g.*, Rules of the House of Representatives in *Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States*, 104th Cong. (1995) (House Doc. No. 103-42); Senate Manual, 104th Cong., 1st Sess. (1995) (Senate Doc. No. 104-1).

message shall be referred. Committee referral is a matter regarding the internal organization and procedures of each chamber and the Act's attempt to establish matters of committee referral for succeeding Congresses violates the Rules Clause.

Subsection 691d(b) sets forth certain time parameters within which Congress must act upon any expedited disapproval bill. Such time parameters prevent succeeding chambers from setting their own calendars and determining when and which bills shall be heard or voted upon, another clear violation of the Rules Clause.

Subsections 691d(d) and (e), which deal with consideration in the House and the Senate, respectively, also violate the Rules Clause by controlling Congress's internal rules and procedures. Subsection (d), for example, limits debate in the House on disapproval bills, precludes motions to reconsider a vote and restricts the making of other motions. Subsection (e) imposes similar limitations on proceedings in the Senate.

Finally, subsection 691d(f) infringes on the ability of each chamber to determine its own rules of proceedings with respect to a conference report. In connection with the House's consideration of a conference report, subsection (f)(2) limits debates and debatable motions and a motion to recommit is not in order. Similarly, in connection with the Senate's consideration of a conference report, subsection (f)(3) limits debate and a motion to recommit is not in order. Finally, subsection (f)(4) places limits on the contents of certain bills when there are disagreements in amendments to disapproval bills and certain other amendments in the nature of a substitute.

CONCLUSION

The Line Item Veto Act transfers to the President the fundamental legislative power of deciding what programs should exist. For over 200 years our system of government, as framed by the Constitution, has been just the opposite. The purpose of the Line Item Veto Act is a truly revolutionary attempt to spare Congress difficult decisions about which programs should exist by having the President make those decisions in its stead. Upholding this effort would place the entire system of federal lawmaking, and the separation of powers itself, in grave jeopardy. This Court must, on this occasion, protect Congress from itself, and thereby protect the Nation.

Respectfully submitted,

ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK
42 West 44th Street
New York, New York 10036-6690
(212) 382-6600
LOUIS A. CRACO, JR., Chair
JAMES F. PARVER
Committee on Federal Legislation

DAVID P. FELSHER
Counsel of Record